Supreme Court, U.S.
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No. 94-___

In The

Supreme Court of the United States

October Term, 1994

CARL FOSTER,

Petitioner,

v.

NORTHWESTERN ELECTRIC COOPERATIVE, INC.,

Respondent.

Petition For A Writ Of Certiorari To The Oklahoma Supreme Court

PETITION FOR A WRIT OF CERTIORARI

DUKE HALLEY*
DAVID B. CHRISTIAN
HALLEY & CHRISTIAN LAW OFFICE
P. O. Box 509
Woodward, OK 73802
(405) 254-9131
Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED FOR REVIEW

I. MAY THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA TAKE A CITIZEN'S REAL PROPERTY WITHOUT COMPENSATION BY AN ORDER CREATING A SECTION LINE, WHERE NO SECTION LINE PREVIOUSLY EXISTED AND WHEN STATE LAW PROVIDES THAT A SECTION LINE MAY NOT BE CREATED WHERE NONE EXISTED BEFORE AND COMPLY WITH THE TAKING CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATES BY MEANS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

II. MAY THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA TAKE A CITIZEN'S REAL PROPERTY UNDER THE AUSPICES OF THE POWER OF CONDEMNATION IN FAVOR OF A PUBLIC UTILITY WHICH HAS NOT EXERCISED ITS RIGHT OF CONDEMNATION AND WHERE NO COMPENSATION IS GRANTED FOR THE PROPERTY TAKEN AND COMPLY WITH THE TAKING CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATES BY MEANS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

III. MAY THE COURT OF APPEALS FOR THE STATE OF OKLAHOMA TAKE A CITIZEN'S PROPERTY BY A MANNER NOT PROVIDED BY STATE LAW OR THE STATE CONSTITUTION AND COMPLY WITH THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS APPLIED TO THE STATES BY MEANS OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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No. 94-___

In The

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CARL FOSTER,

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v.

NORTHWESTERN ELECTRIC COOPERATIVE, INC.,

Respondent.

Petition For A Writ Of Certiorari To The Oklahoma Supreme Court

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

This appeal involves an unpublished opinion of the Court of Appeals of the State of Oklahoma.

There has been one opinion entered by the Court of Appeals of the State of Oklahoma, Division No. III. The opinion was issued on September 15, 1992.

Petitioner's Request for Rehearing was denied by Order of November 17, 1992.

By Order of March 22, 1993, the Supreme Court of the State of Oklahoma granted Petitioner's Petition for Writ

of Certiorari. Certiorari was withdrawn as "improvidently granted" by Order of the Supreme Court of the State of Oklahoma on March 6, 1995.

JURISDICTION

Jurisdiction of this matter is conferred by 28 U.S.C. Section 1257.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the following Amendments to the Constitution of the United States of America, Articles of the Constitution of the State of Oklahoma and Statutes of the United States and State of Oklahoma are reproduced in the Appendix:

Fifth Amendment, Constitution of the United States of America

Fourteenth Amendment, Section 1, Constitution of the United States of America

Article 16, Section 2, Constitution of the State of Oklahoma

43 U.S.C. Section 751
43 U.S.C. Section 752

27 O.S. §4
66 O.S. §51
66 O.S. §52
66 O.S. §53
69 O.S. §1201

69 O.S. §1201.2
69 O.S. §1401

STATEMENT OF THE CASE

Petitioner owns a 320 acre tract of grassland in Harper County, Oklahoma. It is a rural area in Northwest Oklahoma and sparsely populated. Petitioner inherited the tract of land from his father. It has been owned by either Petitioner or his father for 50 years.

Most land in Northwest Oklahoma is divided into 640 acre tracts. These tracts of land were created as a result of the survey of the public lands of the United States prior to any grant. 43 U.S.C. Sections 751, 752. The tracts are bounded by section lines which were reserved for public highways with such reservation having been accepted by the State of Oklahoma. Article 16, Section 2 of the Constitution of the State of Oklahoma.

Petitioner owns a 320 acre tract. It would have been divided by a section line road, but the roadway was never opened and the section line right of way has been abandoned. State law prohibits the creation of a section line where none exists. 69 O.S. Section 1201.2. Thus, no section line roadway may be opened on his property.

There is a meandering dirt road, varying in width from 18 to 30 feet wide, that crosses Petitioner's property. It is not located where a section line roadway would be had it been opened. Petitioner and his father before him have permitted neighbors to drive across the tract in order to shorten their drive home. Petitioner maintains a cattle guard on the road at the entrance to and exit from

his property. His cattle have free reign to cross the road and, in fact, at times bed down on it. Occasionally, over the years, the Board of Commissioners for Woodward County have caused some minimal maintenance to be performed on the roadway. Neither Harper County nor Woodward County have ever claimed the road, exercised the power of eminent domain to take it, or been granted an easement.

Respondent is a public utility vested with the power of eminent domain pursuant to legislative enactment. Its ability to exercise the power of eminent domain is strictly prescribed by statute and a violation of the procedures it must follow results in a loss of the power. 27 O.S. Section 4 and 66 O.S. Sections 51-53.

Respondent contracted to provide electrical service to an iodine plant. In order to do so in the most economical way, it wanted to place its power poles and electrical lines on Petitioner's property. Respondent has an internal policy that it will not pay for right of way. Therefore, it sought Petitioner's permission to use the power line across his property. Petitioner refused permission to Respondent when it refused to pay for right of way or damages.

Respondent concluded it had a right to place the power line along the meandering dirt road crossing Petitioner's property. It went onto Petitioner's property and began placing poles on Petitioner's property near the roadway. Petitioner demanded that Respondent stop.

Respondent sued Petitioner for injunctive relief to prohibit him from stopping its construction of the power line. Petitioner sued Respondent seeking damages for

trespass and an injunction to prohibit Respondent from proceeding with its construction. Respondent filed a counterclaim seeking condemnation.

After a hearing, an order was issued temporarily enjoining Petitioner from preventing construction of the power line within an area 25 feet from the center of the roadway. The judge that issued the temporary injunction thereafter recused himself from any further proceedings due to a conflict of interest. Respondent dismissed its counterclaim for condemnation and then built the power line across Petitioner's property.

A trial of the issues presented resulted in the trial court dissolving the temporary injunction and ordering Respondent to remove its power line. Respondent appealed and the Court of Appeals for the State of Oklahoma, Division No. III, reversed. It held that the meandering road that crossed Petitioner's property was a public road over which the Commissioners of Harper County have jurisdiction to grant permission for use by public utilities *and* that there was a right-of-way beyond the traveled portion; citing 69 O.S. Sections 1201 and 1401. See Unpublished Opinion attached hereto as Appendix A, pp. 2-3.

Petitioner moved for rehearing and was denied. See Appendix B. Petitioner then filed a Petition for Writ of Certiorari asking the Supreme Court for the State of Oklahoma to set aside a Court of Appeals decision "that condones trespass without remedy, taking property without due process or just compensation and constitutes granting of rights by the judiciary contrary to legislative

directive". See Appendix C, pp. 2, Paragraph E(3). Petitioner's Petition for Writ of Certiorari was granted. See Appendix D. Almost two years later, the Order granting certiorari was set aside, certiorari was withdrawn as "improvidently granted", and the writ of certiorari was denied.

REASONS FOR ALLOWING THE WRIT

The decision of the Court of Appeals for the State of Oklahoma was the court of last resort once the Supreme Court for the State of Oklahoma denied the writ of certiorari. It is a decision that creates a public road citing a section line statute in the middle of Petitioner's property and provides Harper County with jurisdiction to allow utilities to enter the right of way. There is no open section line on Petitioner's property. The county has no easement, it has never "opened" a section line road on Petitioner's property and it has never exercised the power of eminent domain as to Petitioner's property. The decision permits Respondent to enter upon Petitioner's property and use the property for its purposes without permission from Petitioner and without compensation. State law does not permit a section line to be created where none existed before. 69 O.S. Section 1201.2.

The decision in effect takes Petitioner's property from him without compensation and has violated his rights of due process contrary to the Fifth Amendment of the Constitution of the United States as applied to the

States by means of the Fourteenth Amendment and contrary to this Court's pronouncement in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed. 2d 868, 102 S.Ct. 3164 (1982) and *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed. 2d 18, 96 S.Ct. 893 (1976).

This Court must not permit state courts of last resort to take property from a citizen of the United States without just compensation and without due process of law. The fact that the Constitutional violations are at the hands of the state judiciary, rather than the executive or legislative branch's of state government, makes no difference as to Petitioner since the end result is the same. This wrong can only be corrected by this Court and this Court should exercise its discretion and grant the Writ for Certiorari.

Respectfully submitted,

DUKE HALLEY*
DAVID B. CHRISTIAN
HALLEY & CHRISTIAN LAW OFFICE
P. O. Box 509
Woodward, OK 73802
(405) 254-9131
Attorneys for Petitioner

*Counsel of Record

APPENDIX A

NOT FOR PUBLICATION

IN THE COURT OF APPEALS OF THE
STATE OF OKLAHOMA

DIVISION NO. III

Carl Foster and Margaret I. Miller, Appellees, vs. Northwestern Electric Cooperative, Appellant,	)	Case No. 77,203 (Filed Sept. 15, 1992)

APPEAL FROM THE DISTRICT COURT OF
HARPER COUNTY, OKLAHOMA

HONORABLE GEORGE LEACH, JUDGE

REVERSED AND REMANDED

Michael F. Stake,
Woodward, Oklahoma, For Appellant,

Duke Halley,
David B. Christian
Woodward, Oklahoma, For Appellees.

Opinion by Stewart M. Hunter, Judge:

Appellant, Northwestern Electric Cooperative, Inc., (Co-op), appeals from the District Court's final order denying Co-op's motion for new trial. We find the court should have sustained the motion and therefore reverse the trial court's order.

Facts

Since 1925, by written and filed agreement, the Counties of Harper and Woodward have maintained 6 miles each of a road which traverses Appellees' land, meandering for a distance near the section line.[1] The section line itself crosses very rough terrain.

Appellant Co-op, in December, 1988, entered into a contract to provide electrical service to North American Brine Resources, a company which mines and manufactures iodine. Appellant then contacted Appellee Foster about possible routes the lines could take across his property. One of the routes was along the road in question. Before construction of the electrical lines, Appellant sought and received consent from the Harper County Commissioners to run the line under the road and within the road right-of-way, on condition that the construction was not closer than 25 feet from the roadway centerline.

---

[1] On March the 7th (1925), the Board of County Commissioners of Harper County met in joint session with the Board of County Commissioners of Woodward County, at C.H. Eastman's residence, Salt Springs, Okla. Those present were Wheelock, Bubb & Johnson, of Woodward County, and Sawyer, Spicer & Bayne, of Harper County, and V.C. Dickinson, clerk of Harper County.

The purpose of the meeting was to designate which portion of the East boundary line of Harper County each shall work. It was unanimously agreed that Woodward County work the south 6 miles, and Harper County the north 6 miles, of the twelve miles of boundary line extending north and south between Harper and Woodward Counties. Book 3, Comm. Journal, p.51.

Thereafter, Appellee Foster voiced objection to the construction and Co-op filed for injunctive relief, praying for a temporary and permanent injunction precluding Foster from interfering with the line construction. Foster then filed his claim for injunctive relief, praying for an order temporarily and permanently enjoining Appellant from installing the electrical line. Foster soon thereafter filed a counterclaim for damages.

At the temporary injunction hearing, the trial court found the road to be public and that a right-of-way existed. The court (1) temporarily enjoined Appellee Foster from interfering with the line installation and (2) temporarily enjoined Appellant from use of the property beyond the 25 foot from the centerline mark.

Appellee Miller filed her claim for damages the next month, June, 1989. In January, 1990, the court consolidated the cases for trial. The court granted Appellees' motion for a jury trial and the case for damages was tried to a jury in November, 1990. The jury was to "advise" the court concerning the equitable issues.

The jury entered a verdict in favor of Appellees, finding that Foster suffered actual damages in the amount of $912.00 and Miller in the amount of $456.00. The court's order, adopting the jury's damages recommendation, awarded damages for trespass. The jury also found that the County had an easement in the road. The court then ordered the temporary injunction dissolved and ordered the Appellant to "remove the poles and powerlines placed on Plaintiffs' Property".

Findings on Review

We find fundamental, prejudicial error in the instruction to the jury which resulted in the denial of a fair trial. The case began as one in equity and it remained essentially an equitable matter. After the court in equity assumed jurisdiction, it also had the power to decide the legal question of damages. *Threet v. Polk*, 620 P.2d 467, (Okl. 1980).

In this case, however, the court granted Appellees' motion for jury trial stating it would ask the jury for advice on the equitable issues. Unfortunately, the jury was unable to advise the court on whether the road in question was a public road because the court refused to submit Appellant's proposed instructions on this issue. The court, in its Instruction No. 2, did ask the jury to decide whether the County had an easement in the road. This was an insufficiently specific question to the jury, one which, instead of asking for answers to proposed facts asked instead for a legal conclusion. Interrogatories to the jury could have cured this problem. The court's order is also devoid of any specific findings to support the mandatory injunction.

This court on review has the power to consider all the evidence on appeal from the order granting injunctive relief. We find the trial court abused its discretion in fashioning the injunctive relief, and that its order requiring the dismantling of all poles and lines is not supported by the evidence. *Board of Regents v. Nat'l Collegiate Athletic Ass'n*, 561 P.2d 499 (Okl. 1977). The evidence does not reveal that Appellees carried their burden of showing a need for the extraordinary remedy of injunction. *Amoco*

Production Co. v. Lindley, 609 P.2d 733 (Okl. 1980). In any event, the evidence supports the conclusion that the road in question is a public road, with appurtenant right-of-way.

We therefore hold that reversible error occurred in instructing the jury and in the ordering of dismantling the poles and lines. We specifically find that the road in question is a public road, maintained by Harper County and over which the Commissioners of Harper County have jurisdiction to grant permission for use by public utilities. The jurisdiction of the County includes the road, its rights-of-way and any existing easement. 69 O.S. §§1201, 1401.

We therefore reverse the trial court's order overruling Appellant's motion for new trial and remand the matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HANSEN, V.C.J. and BAILEY, P.J. concur.

APPENDIX B

RELEASE FOR PUBLICATION IN THE OKLAHOMA BAR JOURNAL BY ORDER OF COURT OF APPEALS

DIVISION 3

November 17, 1992

(Filed Nov. 24, 1992)

THE CLERK IS DIRECTED TO ISSUE THE FOLLOWING ORDERS:

76,891 – Darrel G. Harden, Appellant v. The Board of Regents of the University of Oklahoma, and Richard L. Van Horn, President and Executive Officer of the University of Oklahoma, Appellees.

Appellant's Petition for Rehearing is DENIED.

77,203 – Carl Foster and Margaret I. Miller, Appellees v. Northwestern Electric Cooperative, Appellant.

Appellees' Motion to Supplement Brief on Rehearing is GRANTED.

Appellees' Petition for Rehearing is DENIED.

78,048 – Mel Cooper d/b/a Mel's Towing Service, Appellant v. City of Oklahoma City, Appellee.

Appellee's Petition for Rehearing is DENIED.

78,103 – Bank of Oklahoma, N.A., as Trustee under Trust and Indenture dated March 1, 1980, between Creek County Home Finance Authority and Bank of Oklahoma, N.A., Appellant v. Continental Casualty Company, Appellee.

Appellee's Petition for Rehearing is DENIED.

78,111 – Paul Bussell, Next Friend and Next of Kin, Benjamin Bussell, a minor, and, Paul Bussell and Jan Williamson, individually, Appellants v. Bridge Creek Public School, Bridge Creek School District No. 95, Appellee.

Appellants' Petition for Rehearing is DENIED.

78,550 – D. Katherine Gores, Appellee v. David Scott Gores, Appellant.

Appellant's Petition for rehearing is DENIED.

DONE BY ORDER FOR THE COURT OF APPEALS IN CONFERENCE this 17th day of November, 1992.

/s/ Robert L. Bailey
ROBERT L. BAILEY,
Presiding Judge

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CARL FOSTER and MARGARET I. MILLER, Trustee, Appellees, v. NORTHWESTERN ELECTRIC COOPERATIVE, INC., Appellant.	)	No. 77,203 (Filed Mar. 23, 1993)

ORDER

Petition for Certiorari to review the opinion of the Court of Appeals is hereby granted.

This cause shall stand submitted for decision on briefs on the merits of the above decision of the Court of Appeals unless within ten (10) days from the date hereof either party can show good cause why they should be entitled to file an additional brief herein. 12 O.S. 1991, Ch. 15, App. 3, Rule 3.15.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 22ND DAY OF MARCH, 1993.

/s/ Robert E. Lavender
VICE CHIEF JUSTICE

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

CARL FOSTER and MARGARET I. MILLER, TRUSTEE, Appellees, v. NORTHWESTERN ELECTRIC COOPERATIVE, INC., Appellant.	)	No. 77,203 (Filed Mar. 6, 1995)

ORDER

The Order of this Court dated March 22, 1993, granting certiorari to the Court of Appeals, Division III is set aside and certiorari is withdrawn as improvidently granted. The writ of certiorari is denied.

DONE BY ORDER OF THE SUPREME COURT IN CONFERENCE THIS 6TH DAY OF MARCH, 1995.

/s/ Alma Wilson
CHIEF JUSTICE

WILSON, C.J., HODGES, LAVENDER, SIMMS, HARGRAVE, OPALA, SUMMERS and WATT, JJ., concur.

KAUGER, V.C.J., dissent.

APPENDIX E

IN THE SUPREME COURT

FOR THE STATE OF LOUISIANA

CARL FOSTER AND MARGARET I. MILLER, TRUSTEE, Appellees,	)	Case No. 77,203
vs.	)	
NORTHWESTERN ELECTRIC COOPERATIVE INC., Appellant.	)	(Filed Dec. 11, 1992)

PETITION FOR CERTIORARI

HALLEY & CHRISTIAN
Attorneys for Appellees
Duke Halley, OBA 3741
David B. Christian, OBA 12605
P. O. Box 509
Woodward, OK 73802
(405) 254-9131

December 1992

I. OPINION BELOW

The opinion of the Court of Appeals, Division III, is not for publication and is attached as Exhibit "A". The Court of Appeals rendered its decision on September 15, 1992. It denied Appellee's Petition for Rehearing on November 24, 1992.

II. OUTLINE OF REASONS FOR REVIEW

A. This case presents the following issues of first impression never before determined by the Court.

1. Can the width or use of a prescriptive easement be expanded beyond its actual use?

2. Does the statute, 69 O.S. Section 1201, which recognizes section line easements, have any application to how wide a prescription roadway is, especially when considering 12 O.S. Section 1201.2 which prohibits creation of new section lines where none previously existed?

3. Is a landowner entitled to a mandatory injunction abating a trespass as against a public utility that refuses to exercise its right of imminent domain?

4. Does 69 O. S. Section 1401 enable a Board of County Commissioners to give a public utility permission to place a powerline outside the area of a prescriptive easement?

B. The Court of Appeals' decision decided issues of significance in a manner contrary to previous opinions of this Court, or which appear to be in conflict in the following issues:

1. By concluding that permissive use may result in a prescriptive right, contrary to *Friend v. Holcombe*, 162 P.2d 1008 (Okl. 1945);

2. By refusing appropriate relief to a landowner when a public utility having power of imminent domain purposely refuses to exercise that right and trespasses, contrary to *Allen v. Transok Pipe Line Company*, 522 P.2d 375 (Okl. 1976);

3. By refusing to restore possession to a landowner whose possession was interrupted by issuance of an improper temporary injunction contrary to *Morris v. Gray*, 132 P. 1094 (Okl. 1913).

C. The Court of Appeals misconstrued Article 16, Section 2 of the Oklahoma Constitution and 69 O.S. Section 1201 by concluding those provisions regarding section line roads ipso facto made a prescriptive easement 66 feet wide.

D. The Court of Appeals decision violates the separation of powers doctrine by ignoring the legislative mandate at 69 O.S. Section 1201.2 which prohibits creation of a section line where none exists.

E. The Court of Appeals abused its appellate powers in the following manner.

1. By substituting its conclusions of the evidence without any finding of abuse of discretion by the Trial Court or that the Lower Court's ruling was against the clear weight of evidence;

2. By concluding the jury found that the County had an easement from a general verdict that gives no basis for such a conclusion.

3. By reversing the Trial Court without any analytical or comparative legal basis and which condones trespass without remedy, taking property without due process or just compensation and constitutes granting of rights by the judiciary contrary to legislative directive;

4. By using legal authority which would require a result opposite of its own opinion, e.g.:

> The uncontroverted evidence established Appellant violated the permission obtained by Appellant from the Board of County Commissioners. 69 O. S. Section 1401 states in such an instance the utility may "thereupon be ousted from the use of the highway." Yet, the Court of Appeals used that statute as a reason to reverse the Trial Court's order to remove the lines.

F. The Court of Appeals reversed the Trial Court without use of any true legal reasoning. It appears to have done so simply because it did not like the result mandated by applicable statutory directives and judicial precedence. The decision therefore departed from accepted course of judicial proceedings so as to call for the exercise of this Court's power of supervision.

STATEMENT OF FACTS

Appellant is a public utility. It has an internal policy that it will not pay for right of way.

Appellant contracted to provide electrical services to an iodine plant. To do so in the most economical way, it wanted to go on Appellees' property.

Appellees owned adjoining 320 acre tracts of mostly grassland. The setting is purely rural and sparsely populated. Appellant sought permission to place its powerline on Appellees' property. Permission was denied when Appellant refused to pay any damages or right of way.

The Appellant then sought a means of going on the property anyway. It concluded that it had the right to place the powerline along a roadway that meandered through Appellees' property. That roadway had been in

existence for more than 50 years. It varied in width from 18 to 30 feet and existed, as far as anyone knew, by permission of both the Appellees and their predecessors in title. It was not on a section line. The County did occasionally maintain the road. However, it was uncontroverted that the County had neither condemned nor received any grant of easement. The road is sparingly used by neighboring landowners and oilfield companies with wells on the premises.

Appellant went on the Appellee Foster's property and started placing poles along the roadway. Foster requested Appellant stop. When that occurred, the evolution of this litigation was as follows:

1. Appellant sought relief to enjoin Foster from preventing installation of the line. On the same date, Foster sought damages for trespass and an order enjoining further installation (R. 26-27, Vol I).

2. Appellant's intended use of the property extended beyond even what it could claim as "public" and it therefore sought condemnation by counterclaim (R. 55-57, Vol I).

3. After a hearing, an order was issued temporarily enjoining only *Appellee Foster* from preventing construction of the line within an area twenty-five (25) feet of the center of the roadway (R. 32-33, Vol. I). The judge that issued the temporary injunction later recused himself from considering the granting of a permanent injunction due to a conflict of interest (R. 70-72, Vol. II).

4. After the temporary injunction was issued, Appellant dismissed its counterclaim for condemnation (R. 65, Vol. I). It never again sought that relief.

5. Appellant posted bond for any damages which might result from its actions taken pursuant to the temporary injunction (R. 28-31, Vol. I).

6. Appellant built a powerline across the property without the consent of either Appellee (Tr. 176, Lines 21-23, Tr. 256, Lines 21-23). They changed the configuration to stay *within* 25 feet of the center line (Tr. 449-452). They had obtained permission from the County Commissioners to place the line no *closer* than 25 feet.

The Court of Appeals reversed, concluding the road was "public". Its reasoning is inconsistent, fails to address basic issues in the case and justifies its result by citation to statutes having no relevance or application to the facts.

IV. ARGUMENT AND AUTHORITY

PROPOSITION I: THE COURT OF APPEALS' CONCLUSION THAT THE ROAD IS "PUBLIC" IS NOT DETERMINATIVE OF THE CASE. RATHER IT MERELY LEFT UNANSWERED SIGNIFICANT LEGAL ISSUES. IGNORING THOSE ISSUES RESULTED IN THE VIOLATION OF CONSTITUTIONAL SAFEGUARDS WHICH ARE CONTRARY TO PREVIOUS OPINIONS OF THIS COURT.

At page 3 of its opinion, the Court of Appeals concluded the road was "public". Appellees do not believe that conclusion to be correct. There was no recitation of how the Court made that conclusion or how the apparent

decision otherwise by the Trail [sic] Court was clearly against the weight of evidence. Appellees requests this Court to consider the briefs submitted to the Court of Appeals on this issue and *Friend v. Holcomb, supra.* However, assuming, arguendo, the conclusion to be correct, other questions immediately were presented. Since the road if "public" could become so only by prescription, the most important question was: Can the right obtained extend beyond the area actually occupied?

This Court has never decided the above question. The general rule is that the width of a prescriptive easement cannot be extended beyond the area actually used. See e.g. *Aztec Ltd., Inc. v. Creekside Inv. Co.*, 602 P.2d 64 (Idaho 1979); *Werner v. Schardt*, 382 N.W. 2d 357 (Neb. 1986).

The Court of Appeals simply sidestepped the issue by determining that the Board of County Commissioners had jurisdiction to permit the lines along the road under 69 O.S. Section 1201 and 1401. The former statute provides, in pertinent part:

> "All section lines in the state which are opened and maintained by the board of county commissioners or the Department of Public Highways for public use are hereby declared public highways."

THE COURT OF APPEALS GAVE NO EXPLANATION OF HOW THIS STATUTE COULD APPLY WHEN THE ROAD WAS NOT ON A SECTION LINE. IT FURTHER MADE NO ATTEMPT TO EXPLAIN HOW ITS REASONING COULD BE RECONCILED WITH 69 O.S. SECTION 1201.2 WHICH STATES SUCCINCTLY THAT A SECTION LINE CANNOT BE CREATED "WHERE NONE EXISTED".

A section line has a *common* meaning. It is a boundary between governmental sections. It also has a *legal* meaning regarding easements. By Article 16, Section 2 of the Oklahoma Constitution, section lines *two* rods in width (33 feet) were accepted for public use pursuant to grant from the United States, *Oldfield v. Donelson*, 565 P.2d 37 (Okl. 1977). This road fits neither meaning.

Given the above, the Court of Appeals' decision certainly presents unique questions for this Court to consider, i.e. (1) Can a prescriptive roadway away from a governmental boundary become a "section line" roadway?; and, (2) If so, how can that answer be reconciled with 69 O. S. Section 1201.2 and the doctrine of separation of powers between the legislative and judicial branches be given any true credence?

PROPOSITION II: THIS COURT SHOULD ANNOUNCE WHETHER ITS DECISION OF *Allen v. Transok Pipe Line Company*, 552 P.2d 375 (Okl. 1976) PERMITS ABATEMENT OF A TRESPASS COMMITTED BY A PUBLIC UTILITY THAT PURPOSEFULLY REFUSES TO EXERCISE ITS RIGHT OF IMMINENT DOMAIN, EVEN AS AN ALTERNATIVE MEANS.

In *Allens* [sic] *v. Transok Pipe Line Company*, 552 P.2d 375 (Okl. 1976), a public utility having the power of imminent domain failed to resort to that relief. The plaintiff there sought the same relief as Appellees did here, damages and removal of the line. This Court held:

> "It reasonably follows that in the case at bar, a public utility invested by law with the power to exercise the right of eminent domain is not thereby clothed with an immunity not possessed

> by others who trespass upon the property or rights of private citizens, and must answer for its wrongs the same as any other trespasser.
>
> "We, therefore, hold Appellant has a separate and distinct cause of action in trespass for damages and for punitive damages. However, in those cases in which the landowner elects to sue in tort, the defendant pipeline company can cross-petition for condemnation, and the two causes of action can be tried in the same case."

Appellant ignored even the alternative remedy of condemnation purely and simply because of its policy not to pay for right of way. Rather, it chose to *enjoin* Appellees from preventing entry upon their property. Indeed, it went upon the property and installed the powerlines after obtaining a *temporary* injunction presumably fully cognizant that the temporary injunction might be reversed because it should not have been granted, 12 O.S. Section 1384.2, and, further presumably aware that this Court had long ago determined that Appellees would be entitled to be restored to full possession of their property should the determination regarding the temporary injunction be changed. *Morris v. Gray*, 132 P. 1094 (Okl. 1913).

The Appellant ignored the messages given it by this Court in *Allen* and *Morris*. It purposely refused to seek condemnation and it purposely went on the property after issuance of a temporary injunction.

The Court of Appeals likewise ignored those messages when it determined that Appellees had not shown a basis for injunctive relief. Assuming that reasoning, a

trespasser who incorrectly obtains a temporary injunction, and who, during that time, places structures upon the property providing no benefit to the true owner, can reap profit without consequence. This Court in *Morris* said such a result is an "abuse of legal process" which "cannot be tolerated".

PROPOSITION III: THE OPINION OF THE COURT OF APPEALS IS CONFLICTING AND IS WITHOUT LEGAL BASIS. IT APPEARS TO HAVE REVERSED THE TRIAL COURT SIMPLY BECAUSE IT DID NOT LIKE THE RESULT MANDATED BY APPLICABLE STATUTORY DIRECTIVES AND JUDICIAL PRECEDENCE. THE DECISION THEREFORE DEPARTED FROM ACCEPTED COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

The Court of Appeals' decision contains vital inconsistencies. For example, at Page 2 it concluded that "The jury also found that the county had an easement in the road". Yet, at Page 3 it said the "jury was unable to advise the Court on whether the road in question was a public road." The first conclusion simply is conjecture. A general verdict was returned form [sic] the Appellees. It is impossible to conclude that a general verdict for the Appellees means there was a finding that an easement existed. Moreover, how could the Court say the jury could find an easement existed, but could not advise whether the road was "public"? The case was tried based upon the issue of a prescriptive right purportedly resulting from public use.

Secondly, the Court of Appeals pointed out in its opinion the Harper County Commissioners' consent for construction of the line provided that it be not *closer* than 25 feet from the center of the roadway. In fact, all poles violated that consent. Therefore, the poles do not exist under legal authority. Appellant's failure to comply, under 69 O.S. Section 1401, means that it "may thereupon be ousted from the use of such highway". Yet, the Court of Appeals used Section 1401 as justification for leaving the poles where they were.

Finally, the Court did not state how it could determine the road was public in the face of evidence supporting the Trial Court's ruling. Appellant admitted to having no evidence controverting permission use only. This Court has held that permissive use cannot ripen into an easement. It has reversed a Trial Court's decision which granted an injunction to a party asserting a position similar to Appellant. *Friend, supra.* Indeed, two of the justices of the Court of Appeals recognized that fact in *Brown v. Mayfield*, 786 P.2d 708, 712 (Okl. App. 1989).

The Court of Appeals gave no explanation of how those cases were not controlling here.

One must consider whether the Court of Appeals simply did not like the result they would have to reach if legal principals [sic] relevant to the facts were applied. In any case, there was a failure to apply applicable legal reasoning which Appellees believe "calls for the exercise of this Court's power of supervision". Rule 3.13(A)(4), Rules on Practice & Procedure in the Court of Appeals and on Certiorari to that Court.

CONCLUSION

Appellant has a policy that it will not pay for right of way. The wisdom of that policy ultimately must rest with the powers that be within the Appellant's corporate structure. Yet, if it chooses to continue the policy, as it did in this case, it cannot do so by abridging the constitutional right of owners to unmolested uses of their property without just compensation.

Appellant had its choice. It could find a legal or consensual route. Alternatively, it could have gone on Appellees' property the legal way, i.e. by seeking condemnation. It did neither. It chose to go all or nothing; it went for broke.

The Court of Appeals' opinion condones this modern form of piracy without regard to legal authority and in violation of constitutional safeguards, including separation of powers. Its opinion demands review and vacation.

HALLEY & CHRISTIAN
Attorneys for Appellees

/s/ Duke Halley
Duke Halley, OBA 3741
David B. Christian, OBA 12605
P. O. Box 509
Woodward, OK 73802
(405) 254-9131

CERTIFICATE OF MAILING

I hereby certify that on this 11th day of December, 1992, I mailed a true and correct copy of the above and foregoing instrument to-wit:

Michael F. Stake
P.O. Box 187
Woodward, OK 73802
(405) 254-9181
Attorney for Appellant

Harper County Court Clerk
Harper County Courthouse
Buffalo, OK 73834

/s/ Duke Halley
Duke Halley-
David B. Christian

NOT FOR PUBLICATION

IN THE COURT OF APPEALS OF
THE STATE OF OKLAHOMA

DIVISION NO. III

Carl Foster and Margaret I. Miller, Appellees, vs. Northwestern Electric Cooperative, Appellant,	)	Case No. 77,203 (Filed Sept. 15, 1992)

APPEAL FROM THE DISTRICT COURT
OF HARPER COUNTY, OKLAHOMA

HONORABLE GEORGE LEACH, JUDGE

REVERSED AND REMANDED

Michael F. Stake,
Woodward, Oklahoma, For Appellant,

Duke Halley,
David B. Christian
Woodward, Oklahoma For Appellees.

Opinion by Stewart M. Hunter, Judge:

Appellant, Northwestern Electric Cooperative, Inc., (Co-op), appeals from the District Court's final order denying Co-op's motion for new trial. We find the court should have sustained the motion and therefore reverse the trial court's order.

Facts

Since 1925, by written and filed agreement, the Counties of Harper and Woodward have maintained 6 miles each of a road which traverses Appellees' land, meandering for a distance near the section line.[1] The section line itself crosses very rough terrain.

Appellant Co-op, in December, 1988, entered into a contract to provide electrical service to North American Brine Resources, a company which mines and manufactures iodine. Appellant then contacted Appellee Foster about possible routes the lines could take across his property. One of the routes was along the road in question. Before construction of the electrical lines, Appellant sought and received consent from the Harper County Commissioners to run the line under the road and within the road right-of-way, on condition that the construction was not closer than 25 feet from the roadway centerline.

---

[1] On March the 7th (1925), the Board of County Commissioners of Harper County met in joint session with the Board of County Commissioners of Woodward County, at C.H. Eastman's residence, Salt Springs, Okla. Those present were Wheelock, Bubb & Johnson, of Woodward County, and Sawyer, Spicer & Bayne, of Harper County, and V.C. Dickinson, clerk of Harper County.

The purpose of the meeting was to designate which portion of the East boundary line of Harper County each shall work. It was unanimously agreed that Woodward County work the south 6 miles, and Harper County the north 6 miles, of the twelve miles of boundary line extending north and south between Harper and Woodward Counties. Book 3, Conn. Journal, p.51.

Thereafter, Appellee Foster voiced objection to the construction and Co-op filed for injunctive relief, praying for a temporary and permanent injunction precluding foster from interfering with the line construction. Foster then filed his claim for injunctive relief, praying for an order temporarily and permanently enjoining Appellant from installing the electrical line. Foster soon thereafter filed a counterclaim for damages.

At the temporary injunction hearing, the trial court found the road to be public and that a right-of-way existed. The court (1) temporarily enjoined Appellee Foster from interfering with the line installation and (2) temporarily enjoined Appellant from use of the property beyond the 25 foot from the centerline mark.

Appellee Miller filed her claim for damages the next month, June, 1989. In January, 1990, the court consolidated the cases for trial. The court granted Appellees' motion for a jury trial and the case for damages was tried to a jury in November, 1990. The jury was to "advise" the court concerning the equitable issues.

The jury entered a verdict in favor of Appellees, finding that Foster suffered actual damages in the amount of $912.00 and Miller in the amount of $456.00. The court's order, adopting the jury's damages recommendation, awarded damages for trespass. The jury also found that the County had an easement in the road. The court then ordered the temporary injunction dissolved and ordered the Appellant to "remove the poles and powerlines placed on Plaintiffs' Property".

Findings on Review

We find fundamental, prejudicial error in the instruction to the jury which resulted in the denial of a fair trial. The case began as one in equity and it remained essentially an equitable matter. After the court in equity assumed jurisdiction, it also had the power to decide the legal question of damages. *Threet v. Polk,* 620 P.2d 467, (Okl. 1980).

In this case, however, the court granted Appellees' motion for jury trial stating it would ask the jury for advice on the equitable issues. Unfortunately, the jury was unable to advise the court on whether the road in question was a public road because the court refused to submit Appellant's proposed instructions on this issue. The court, in its Instruction No. 2, did ask the jury to decide whether the County had an easement in the road. This was an insufficiently specific question to the jury, one which, instead of asking for answers to proposed facts asked instead for a legal conclusion. Interrogatories to the jury could have cured this problem. The court's order is also devoid of any specific findings to support the mandatory injunction.

This court on review has the power to consider all the evidence on appeal from the order granting injunctive relief. We find the trial court abused its discretion in fashioning the injunctive relief, and that its order requiring the dismantling of all poles and lines is not supported by the evidence. *Board of Regents v. Nat'l Collegiate Athletic Ass'n,* 561 P.2d 499 (Okl. 1977). The evidence does not reveal that Appellees carried their burden of showing a need for the extraordinary remedy of injunction. *Amoco*

Production Co. v. Lindley, 609 P.2d 733 (Okl. 1980). In any event, the evidence supports the conclusion that the road in question is a public road, with appurtenant right-of-way.

We therefore hold that reversible error occurred in instructing the jury and in the ordering of dismantling the poles and lines. We specifically find that the road in question is a public road, maintained by Harper County and over which the Commissioners of Harper County have jurisdiction to grant permission for use by public utilities. The jurisdiction of the County includes the road, its rights-of-way and any existing easement. 69 O.S. §§1201, 1401.

We therefore reverse the trial court's order overruling Appellant's motion for new trial and remand the matter for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

HANSEN, V.C.J. and BAILEY, P.J. concur.

APPENDIX F

U.S. CONSTITUTION ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

* * *

ARTICLE XVI, OKLA. CONSTITUTION

§ 2. Acceptance of lands granted or reserved for highway

The State of Oklahoma hereby accepts all reservations and lands for public highways made under any grant, agreement, treaty, or act of Congress: Provided, This section shall not be construed to prejudice the vested rights of any tribe, allottee, or other person to any such land.

* * *

43 U.S.C. § 751. Rules of survey

The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation, or of tracts of land surveyed or patented prior to May 18, 1796, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require.

Second. The corners of the townships must be marked with progressive numbers from the beginning; each distance of a mile between such corners must be also distinctly marked with marks different from those of the corners.

Third. The township shall be subdivided into sections, containing, as nearly as may be, six hundred and forty acres each, by running parallel lines through the same from east to west and from south to north at the distance of one mile from each other, and marking corners at the distance of each half mile. The sections shall be numbered, respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers, until the thirty-six be completed.

Fourth. The deputy surveyors, respectively, shall cause to be marked on a tree near each corner established in the manner described, and within the section, the number of such section, and over it the number of the township within which such section may be; and the deputy surveyors shall carefully note, in their respective

field books, the names of the corner-trees marked and the numbers so made.

Fifth. Where the exterior lines of the townships which may be subdivided into sections or half-sections exceed, or do not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of sections or half-sections in such township, according as the error may be in running the lines from east to west, or from north to south; the sections and half-sections bounded on the northern and western lines of such townships shall be sold as containing only the quantity expressed in the returns and plats respectively, and all others as containing the complete legal quantity.

Sixth. All lines shall be plainly marked upon trees, and measured with chains, containing two perches of sixteen and one-half feet each, subdivided into twenty-five equal links; and the chain shall be adjusted to a standard to be kept for that purpose.

Seventh. Every surveyor shall note in his field book the true situations of all mines, salt licks, salt springs, and mill-seats which come to his knowledge; all watercourses over which the line he runs may pass; and also the quality of the lands.

Eighth. These field books shall be returned to the Secretary of the Interior or such officer as he may designate, who shall cause therefrom a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales. He shall also

cause a fair plat to be made of the townships and fractional parts of townships contained in the lands, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose; and a copy thereof shall be kept open at the office of the Secretary of the Interior or of such agency as he may designate for public information, and other copies shall be sent to the places of the sale, and to the Bureau of Land Management.

43 U.S.C. § 752. Boundaries and contents of public lands; how ascertained

The boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands shall be ascertained in conformity with the following principles:

First. All the corners marked in the surveys, returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.

Second. The boundary lines, actually run and marked in the surveys returned by the Secretary of the Interior or such agency as he may designate, shall be established as the proper boundary lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary

lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the watercourse, Indian boundary line, or other external boundary of such fractional township.

Third. Each section or subdivision of section, the contents whereof have been returned by the Secretary of the Interior or such agency as he may designate, shall be held and considered as containing the exact quantity expressed in such return; and the half sections and quarter sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make part.

(R.S. § 2396; Mar. 3, 1925, c. 462, 43 Stat. 1144; 1946 Reorg.Plan No. 3, § 403, eff. July 16, 1946, 11 F.R. 7876, 60 Stat. 1100.)

27 O.S. § 4. Water-power companies – Right of eminent domain

Any water power company, organized under the laws of this state, shall have power to exercise the right of eminent domain in like manner as railroad companies, for the purpose of securing sites for the erection of water power plants, together with the necessary dams over any nonnavigable stream and sites for the storage of water, and of securing rights-of-way for the necessary flumes and conduits for the purpose of conducting water for public or private consumption, and generating power, and for the purpose of securing rights-of-way for poles, wire and cables for transferring and transmitting electricity generated by water.

R.L.1910, § 3187.

66 O.S. § 51. Power to enter upon and appropriate lands

Every railroad corporation incorporated under this article,[1] and any railroad corporation authorized to construct, operate or maintain a railroad within this state, has power and is authorized to enter upon any land for the purpose of examining and surveying its railroad, and to take, hold and appropriate so much real estate as may be necessary for the location, construction and convenient use of its road, including all necessary grounds for buildings, stations, workshops, depots, machineshops, switches, sidetracks, turntables, snow defenses and water stations; all material for the construction of such road and its appurtenances, and the right-of-way over adjacent land sufficient to enable such corporation to construct and repair its road and the right to conduct water to its water stations, and to construct and maintain proper drains, and may obtain the right to such real estate by purchase or condemnation in the manner provided by the law.

R.L.1910, § 1397.

66 O.S. § 52. Purchasing or taking realty

Any railroad corporation may purchase and use real property for a price to be agreed upon with the owners thereof; or the damages to be paid by such corporation for any real property taken as aforesaid, when not agreed

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[1] R.L.1910, c. 15, art. 13, incorporated in this title and Title 18, § 601.

upon, shall be ascertained and determined as hereinafter provided.

R.L.1910, § 1399.

66 O.S. § 53. Taking by eminent domain – Commissioners – Appointment and proceedings – Right to construct road

A. If the owner of any real property or interest therein, over which any railroad corporations, incorporated under the laws of this state, may desire to locate its road, shall refuse to grant the right-of-way through and over his premises, the district judge of the county in which said real property may be situated shall, upon the application or petition of either party, and after ten (10) days' notice to the opposite party, direct the sheriff of said county to summon three disinterested freeholders, to be selected by said judge as commissioners, and who shall not be interested in a like question.

B. The condemnor shall give notice to a condemnee by personal service or by leaving a copy of the notice at the condemnee's place of residence with some member of his family over fifteen (15) years of age, or by publication in the case of a condemnee who resides out of this state or a resident of this state who has departed herefrom with intent to avoid service of notice, or whose whereabouts or identity the condemnor, or his attorney, upon diligent inquiry is unable to ascertain, or an unknown heir, successor or assign of one in whom some right, title or interest in the property concerned was possessed, by publishing such notice once a week for two (2) consecutive weeks in a newspaper authorized by law to publish

legal notices in the county where the petition is filed, the ten-day period to begin with the first publication. A copy of such notice and a copy of the petition shall be mailed to such opposite party's last-known mailing address within five (5) days of the first publication thereof. The procedure for service by publication as authorized herein shall in all other respects be as provided by law for service by publication in civil actions, except summons need not first be issued.

C. The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the just compensation to which said owner is entitled; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and just compensation for the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk. A certified copy of the report may be transmitted to the county clerk of the county where the land lies, to be by him filed and recorded, without further acknowledgment or proof, in the manner and with like force and effect as is provided for the recording of deeds. And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.

D. "Just compensation", as used in subsection C of this section, shall mean the value of the property taken, and in addition, any injury to any part of the property not taken. Any special and direct benefits to the part of the property not taken may be offset only against any injury to the property not taken. If only a part of a tract is taken, just compensation shall be ascertained by determining the difference between the fair market value of the whole tract immediately before the taking and the fair market value of that portion left remaining immediately after the taking.

R.L.1910, § 1400; Laws 1971, c. 33, § 1, operative Jan. 1, 1972; Laws 1973, c. 28, § 1, eff. Jan. 1, 1974; Laws 1991, c. 175, § 2, emerg. eff. May 8, 1991.

69 O.S. § 1201. Open section lines as public highways – Reserved section lines

All section lines in the state which are opened and maintained by the board of county commissioners or the Department of Public Highways for public use are hereby declared public highways. All section lines that are not so opened and maintained for public use may, by resolution of board, on the petition of the owner or all the owners of the abutting land, after public notice and at the expense of petitioner, be designated "reserved section lines" and are in the full and complete control of the owner or owners of the abutting land until such time as the board of county commissioners, by resolution, stating imminent intended use for public highway purposes, and by ninety-day written notice to the owner or owners of the abutting land, revoke said "reserved section lines" status. Provided, however, that no section line may be placed in reserve status unless the full width of such section line is so treated and no fee owner shall be denied the right of ingress and egress to his land by virtue of this act. Whenever a section line is a boundary line between two counties, action by boards of county commissioners of both counties will be necessary to place a section line in "reserve status."

Laws 1968, c. 415, § 1201, operative July 1, 1968. Laws 1975, c. 80, § 1, emerg. eff. April 24, 1975.

* * *

69 O.S. § 1201.2[1] New section lines not created – Existing lines not widened – Indian lands

Nothing in this act[2] shall be construed to create a section line where none existed, nor to widen an existing section line, nor in any way to conflict with provisions relating to section lines of Indian treaties or Acts of Congress providing for disposition of Indian lands, nor to diminish any existing rights of any owners of abutting land, or registered land surveyors to enter section lines in the official conduct of their business.

Laws 1975, c. 80, § 3, emerg. eff. April 24, 1975.

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[1] Not enacted as part of Highway Code.

[2] Section 1201 et seq. of this title.

69 O.S. § 1401. Use of highways, rights-of-way and easement by public utilities and cable television system – Consent, terms and conditions

(a) Any public utilities or cable television system, not otherwise authorized to do so, lawfully operating or doing business in the State of Oklahoma shall have the right to use the public roads and highways of this state, including the right-of-way and all easements pertaining thereto, as hereinafter provided.

(b) The use of the public roads and highways by such public utilities or cable television system shall be for the purpose of erecting poles and posts, attaching equipment, wires and fixtures thereto and laying pipes and conduits under the surface thereof. Such poles, wires, fixtures, pipes and conduits shall be erected, placed, adjusted or laid and maintained only after obtaining the consent of, and under such rules and regulations as shall be prescribed by, the Commission as to the state highway system, and the boards of county commissioners of the various counties as to roads and highways under their jurisdiction. Provided, that nothing herein shall be construed to grant the right to use the streets or other places of any municipality of this state without the consent of such municipality. Provided, further, that the boards of county commissioners may grant to any citizen the right to lay pipes and conduits under the surface of any road or highway under their jurisdiction, subject to such rules, regulations and conditions as shall be prescribed by the board of county commissioners. Provided, further, that nothing herein shall be construed to limit any rights granted by other provisions of law. Provided, further, that

such poles, wires, posts, conduits and equipment shall be erected, placed, adjusted, laid, constructed and maintained so as not to incommode or endanger the public in the use of its roads and highways.

Public utilities or cable television systems shall completely repair or replace any damage, injury or other change to public roads or highways of any county or municipality which would incommode or endanger the public which are caused by the erection, placement, adjustment, construction or maintenance of any public utility or cable television system poles, wires, posts, conduits or other equipment. Provided that nothing in this act[1] shall be interpreted to impair the right of recovery against any third party for such damage or injury.

(c) The failure of any such public utility or cable television system to construct or maintain its poles, wires, conduits, pipe lines and equipment upon or under such public highways in full compliance with the rules and regulations promulgated by the Commission or the board of county commissioners involved shall forfeit the right of such utility or cable television system herein granted to use such public highway or highways, and such utility or cable television system may thereupon be ousted from the use of such highway.

Laws 1968, c. 415, § 1401, operative July 1, 1968. Laws 1980, c. 121, § 1; Laws 1985, c. 274, § 1, emerg. eff. July 18, 1985.

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[1] Section 1401 et seq. of this title.

Supreme Court, U.S.
FILED
JUN 30 1995
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(2)

No. 94-1972

In The

Supreme Court of the United States

October Term, 1994

CARL FOSTER,

Petitioner,

v.

NORTHWESTERN ELECTRIC COOPERATIVE, INC.,

Respondent.

On Petition For A Writ Of Certiorari
To The Oklahoma Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

MICHAEL F. STAKE
P.O. Box 187
Woodward, OK 73802
(405) 254-9181
Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTION PRESENTED

Is the Oklahoma Court of Appeals Division III holding reversing the Harper County District Court's order overruling Respondent's motion for new trial and remanding to the Harper County District Court for further proceedings consistent with its opinion a "final judgment" for purposes of 28 U.S.C. § 1257?

PARTIES

Petitioner, Carl Foster, is an individual.

Respondent, Northwestern Electric Cooperative, Inc. is a cooperative corporation organized pursuant to the Rural Electric Cooperative Act, 18 O.S. §§ 437 et seq.

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In The

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October Term, 1994

CARL FOSTER,

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v.

NORTHWESTERN ELECTRIC COOPERATIVE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The Oklahoma Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

Respondent, **Northwestern Electric Cooperative, Inc.**, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, **Carl Foster**.

OPINIONS BELOW

This case has its origin in the District Court of Harper County, Oklahoma. On November 9, 1990 a jury returned a verdict in favor of Petitioner for damages in the sum of $912.00 and judgment was accordingly

entered. On February 12, 1991 the District Court of Harper County, Oklahoma entered its order overruling the motion of Respondent for a new trial. Respondent appealed to the Oklahoma Supreme Court which assigned the case to the Court of Appeals Division No. III ("the Court of Appeals.")

On September 15, 1992 the Court of Appeals entered its order reversing the trial court and remanded the case back to the District Court of Harper County for further proceedings consistent with its opinion. Petitioner's Petition for Rehearing was denied. On March 23, 1993 the Oklahoma Supreme Court granted Petitioner's Petition for Writ of Certiorari. However, on March 6, 1995 the Oklahoma Supreme Court entered an order recalling its previous order granting the writ of certiorari.

STATEMENT OF THE CASE

On December 6, 1988 Respondent entered into a contract to provide electrical services to a customer. The contract necessitated construction of the line over a portion of Petitioner's land. Prior to construction Respondent had numerous discussions with Petitioner concerning the location of the line across his land and obtained his consent to survey proposed routes. One of the proposed construction locations was along a road ("the road") crossing Petitioner's property.

The road was constructed by the county in 1925 and is similar to other county roads in the area. Due to the steep canyons and ravines, the road takes the path of least resistance between the canyons and ravines and is

located west of the east boundary line of Petitioner's property. The road as constructed is a part of the county road system and is approximately 12 miles in length. Since construction of the road, it has been open to general public vehicular traffic and is characterized as a "minor collector" by the Oklahoma Department of Transportation and the official road maintenance map of the Harper County Commissioners.

On March 7, 1925 the Commissioners of Harper and Woodward County entered into a joint agreement that Woodward County would maintain the South 6 miles of the road and Harper County would maintain the North 6 miles of the road. Petitioner has never protested that the road has been maintained with public funds and public property since 1925.

Prior to construction of the line, Respondent requested permission from the Harper County Commissioners to construct the line within the road right-of-way. On April 3, 1989 the Harper County Commissioners voted that they had no objection to Respondent "running a new electric line across (Petitioner's property)".

Respondent again appeared before the Commissioners on April 25, 1989 and specifically requested consent to construct the line within the right-of-way along the road crossing Petitioner's property. The Commissioners found that Respondent had complied with all rules and regulations and ratified their earlier consent. The Commissioners consented to the erection and maintenance of Respondent's line under the road and within the road right-of-way.

Because construction of the line would cross real property owned by people other than Landowners, Respondent appeared before the Commissioners, on May 1, 1989, and requested consent to construct the line along the right-of-way of the road as it crossed all applicable Harper County real property. The Commissioners unanimously consented to construction of the line on the condition that construction was not closer than 25 feet from the roadway centerline. Consequently, Respondent completed construction of the line.

On April 10, 1989 Respondent filed its claim against Petitioner praying for a temporary and permanent injunction against Petitioner to preclude him from interfering with Respondent's construction of an electrical distribution line ("the line") within the right-of-way of a county road that crossed Petitioner's property. Thereafter, Petitioner filed his claim against Respondent praying for a temporary and permanent injunction against Respondent to preclude Respondent from constructing the line on any portion of his property. On April 14, 1989 the trial court entered an order consolidating all claims involving Petitioner and Respondent into one action. Subsequently, Petitioner filed his counterclaim for damages.

On November 9, 1990 a jury returned a verdict in favor of Petitioner and judgment was accordingly entered in favor of Petitioner as follows: (1) Judgment in favor of Petitioner and against Respondent for damages in the sum of $912.00; and (2) Respondent's temporary injunction which had precluded Petitioner from interfering with the erection, maintenance and installation of the line

within a 25 feet right-of-way from the center of the traveled portion of the public road was dissolved. Respondent was further ordered to remove the line from the real property owned by Landowners. Respondent's motion for new trial was overruled.

On September 15, 1992 the Court of Appeals entered its order reversing the trial court and remanded the case back to the District Court of Harper County for further proceedings consistent with its opinion. The Court of Appeals entered three specific holdings on appeal. First, the Court of Appeals held that this case "was one in equity and it remained essentially an equitable matter" thus Petitioner was not entitled to a jury trial. The second, but pivotal issue resolved by the Court of Appeals was the status of a road which crosses land owned by Petitioner. Was the road "public" or "private"? The Court of Appeals held:

> **We specifically find that the road in question is a public road, maintained by Harper County and over which the Commissioners of Harper County have jurisdiction to grant permission for use by public utilities. The jurisdiction of the County includes the road, its rights-of-way and any existing easement.**

The Court specifically found the road in question to be a "public road" which is defined by 69 O.S. § 232 as follows: "A road constructed to connect other public roads or streets, but not connected to the highway." The Court of Appeals cited 69 O.S. § 1401 which provides in part:

> The use of the **public roads** and highways by such public utilities . . . shall be for the purpose

> of erecting poles and posts, attaching equipment, wires and fixtures thereto . . . Such poles, wires, fixtures, pipes and conduits shall be erected, placed, adjusted or laid and maintained only after obtaining the consent of, and under such rules and regulations as shall be prescribed by, . . . the boards of county commissioner of the various counties as to roads and highways under their jurisdiction.

The Court of Appeals further held: "We find the trial court abused its discretion in fashioning the injunctive relief, and that its order requiring the dismantling of all poles and lines is not supported by the evidence. *Board of Regents v. Nat'l Collegiate Athletic Ass'n*, 561 P.2d 499 (Okla. 1977). The evidence does not reveal that (Petitioner) carried (his) burden of showing a need for the extraordinary remedy of injunction. *Amoco Production Co. v. Lindley*, 609 P.2d 733 (Okla. 1980)."

SUMMARY OF THE ARGUMENT

This Court is without jurisdiction at this time. No **final judgment** has been rendered by the highest court of Oklahoma.

REASONS FOR DENYING THE WRIT

The Court of Appeals reversed the trial court's order denying Respondent's motion for new trial and remanded the case for further proceedings consistent with its opinion. No final judgment has yet to be entered by the highest court of Oklahoma. Petitioner has cited 28

U.S.C. § 1257 as the jurisdictional springboard to this Court, but it avails him not. 28 U.S.C. § 1257 provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any privilege, or immunity is specially set up or claimed under the Constitution of . . . the United States.

NO FINAL JUDGMENT HAS BEEN ENTERED THUS PRECLUDING FEDERAL APPELLATE JURISDICTION

This Court has repeatedly held that its appellate jurisdiction is regulated by 28 U.S.C. § 1257. "Since 1789, Congress has granted this Court appellate jurisdiction with respect to state litigation only after the highest state court in which judgment could be had has rendered a 'final judgment or decree.' Title 28 USC § 1257 [28 USCS § 1257] retains this limitation on our power to review cases coming from state courts." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476-477 (1975).

As with any rule it is not meant to be rigid and a few specific exceptions have been created. *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120 (1945). Merely because further proceedings are to be conducted in the lower state court does not necessarily preclude review by this Court on the jurisdictional grounds of lack of a "final judgment."

Before jurisdiction is present to allow this Court appellate review both the issue of whether a taking has occurred and a failure of just compensation must have been decided by the state's highest court. " . . . the federal

constitutional question embraces not only a taking, but a taking on payment of just compensation. A state judgment is not final unless it covers both aspects of that integral problem." *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 163 (1973). Here, Respondent complied with all applicable laws of the State of Oklahoma. Respondent specifically sought permision from the Harper County Commissioners to construct the line along the road. Under Oklahoma law county commissioners have exclusive jurisdiction to permit utilities to use public roads. Respondent had complied with every rule and regulation of the Harper County Commissioners who authorized construction not closer than twenty-five (25) feet from the public roadway center.

In *San Diego Gas & Electric Co. v. San Diego*, 450 U.S. 621, 632-633 (1981) this Court dismissed a petition for certiorari holding in part:

> Ever since this Court's decision in *Grays Harbor Co. v. Coats-Fordney Co.*, 243 U.S. 251 (1917) a state court's holding that private property has been taken in violation of the Fifth and Fourteenth Amendments and that further proceedings are necessary to determine the compensation that must be paid has been regarded as a classic example of a decision not reviewable in this Court because it is not "final." In such a case, the "remaining litigation may raise other federal questions that may later come here."

The Statutes of the United States as well as this Court's prior case law have defined the limits of this Court's appellate jurisdiction. Petitioner has failed to establish the jurisdictional prerequisite of a final judgment to empower this court's appellate jurisdiction.

CONCLUSION

Respondent, Northwestern Electric Cooperative, Inc., respectfully submits that no final judgment has been entered at this time by the Courts of Oklahoma. Consequently, the Petition for a writ of certiorari as filed herein by Petitioner, Carl Foster, is jurisdictionally defective and should be denied.

MICHAEL F. STAKE
P.O. Box 187
Woodward, OK 73802
(405) 254-9181

Attorney for Respondent

APPENDIX A

69 O.S. § 232 **Public Road**

A road constructed to connect other public roads or streets, but not connected to the highway.

69 O.S. § 1401. **Use of highways, rights-of-way and easement by public utilities and cable television system – Consent, terms and conditions**

(a) Any public utilities or cable television system, not otherwise authorized to do so, lawfully operating or doing business in the State of Oklahoma shall have the right to use the public roads and highways of this state, including the right-of-way and all easements pertaining thereto, as hereinafter provided.

(b) The use of the public roads and highways by such public utilities or cable television system shall be for the purpose of erecting poles and posts, attaching equipment, wires and fixtures thereto and laying pipes and conduits under the surface thereof. Such poles, wires, fixtures, pipes and conduits shall be erected, placed, adjusted or laid and maintained only after obtaining the consent of, and under such rules and regulations as shall be prescribed by, the Commission as to the state highway system, and the boards of county commissioners of the various counties as to roads and highways under their jurisdiction. Provided, that nothing herein shall be construed to grant the right to use the streets or other places of any municipality of this state without the consent of such municipality. Provided, further, that the boards of county commissioners may grant to any citizen the right to lay pipes and conduits under the surface of any road

or highway under their jurisdiction, subject to such rules, regulations and conditions as shall be prescribed by the board of county commissioners. Provided, further, that nothing herein shall be construed to limit any rights granted by other provisions of law. Provided, further, that such poles, wires, posts, conduits and equipment shall be erected, placed, adjusted, laid, constructed and maintained so as not to incommode or endanger the public in the use of its roads and highways.

Public utilities or cable television systems shall completely repair or replace any damage, injury or other change to public roads or highways of any county or municipality which would incommode or endanger the public which are caused by the erection, placement, adjustment, construction or maintenance of any public utility or cable television system poles, wires, posts, conduits or other equipment. Provided that nothing in this act shall be interpreted to impair the right of recovery against any third party for such damage or injury.

(c) The failure of any such public utility or cable television system to construct or maintain its poles, wires, conduits, pipe lines and equipment upon or under such public highways in full compliance with the rules and regulations promulgated by the Commission or the board of county commissioners involved shall forfeit the right of such utility or cable television system herein granted to use such public highway or highways, and such utility or cable television system may thereupon be ousted from the use of such highway.

28 U.S.C. § 1257 **State courts; certiorari**

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.